

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

July 17, 2007

No. 269794

Wayne Circuit Court

LC No. 05-011964-01

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree criminal sexual conduct, MCL 750.520b(1)(c), and first-degree home invasion, MCL 750.110a(2). Defendant received concurrent sentences of 55 to 100 years' imprisonment for the first-degree criminal sexual conduct conviction and 8 to 20 years' imprisonment for the first-degree home invasion conviction, with credit for 148 days served. We affirm.

I. Facts

About 1:00 a.m. on May 11, 2005, the 13-year-old victim was sleeping in her bed in her Detroit home. Her mother had just left the house to deliver spare keys to a friend who had locked herself out of her car. Defendant, who was not known by either the victim or her mother, entered the home without permission. Defendant began choking the victim as she slept, awakening her. When the victim tried to speak, defendant pushed her on her back, put his hand over her mouth, and put a pillowcase over her face. He removed the victim's shorts and underpants and placed his penis in her vagina. He then licked and kissed her breasts and attempted to place his penis in her anus. Defendant heard the victim's mother returning and fled from the house. The victim was transported by ambulance to the hospital. She was then taken to a sexual assault clinic, where a forensic nurse collected physical evidence from her body. DNA found on the victim's body matched defendant's DNA.

The trial court granted the prosecution's motion to admit other acts evidence of a sexual assault that defendant allegedly committed against a 17-year-old woman in 2001. This woman, in her early 20s at the time of trial, testified that she was living with a friend in December 2001. On the night of December 15, 2001, the woman was sleeping in a bedroom on the first floor of the home. The woman awoke when an unknown male moved her on her back and attempted to smother her by placing his hands around her neck and nose. The perpetrator removed her sleep

pants and underwear, licked her vagina and anus, and penetrated her vagina with his penis. The perpetrator then ran from the room and left the house. The woman could not identify the perpetrator and did not know defendant. Nobody at the house where the woman was staying in December 2001 had permitted the perpetrator to enter. DNA found on the woman's body also matched defendant's DNA.

II. Ineffective Assistance of Counsel

First, defendant argues that he was denied his Sixth Amendment right to the effective assistance of counsel at a critical stage of the proceedings because his trial attorney failed to meet with him until the day before trial. We disagree. Because defendant failed to move for a new trial or a *Ginther*¹ hearing, this issue is unpreserved. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Therefore, our review of this claim of error is limited to mistakes apparent on the record. *Id.*

Whether defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first determine the facts and then decide whether these facts constitute a violation of defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error, but we review constitutional determinations de novo. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*LeBlanc, supra* at 578]. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Id.* at 314; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). [*People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).]

However, if defendant was denied counsel during a critical stage of the proceedings, these proceedings are presumed to have been unfair. *United States v Cronin*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). In this case, the conviction would be constitutional error and no showing of prejudice would be required. *Id.* at 659 n 25.

On appeal, defendant alleges that he was denied the assistance of counsel throughout the pretrial stage of the proceedings and that, pursuant to *Cronin*, this error alone establishes that his conviction was unconstitutional. However, other than defendant's claim during his motion for self-representation that the first time defense counsel came to see him was the day before the trial

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

began, there is no evidence on the record indicating the number of times that defense counsel met with defendant. Defendant cannot rely merely on a self-serving statement made to the trial court, but not under oath, claiming that his counsel failed to see him until the day before trial began in order to establish that he was denied counsel during the pretrial process. Further, the record indicates that counsel assisted defendant during the pretrial proceedings. Defendant's trial counsel appeared before the trial court on two dates in connection with the prosecution's motion to admit other acts evidence under MRE 404(b). Further, in the process of arguing against the admission of MRE 404(b) evidence, defense counsel discussed an anticipated defense of consent based on information likely acquired through discussions with defendant.² Further, defense counsel competently argued during these pretrial motion hearings that evidence of the prior alleged sexual assault should not be admitted because it would be more prejudicial than probative. Defense counsel provided the assistance ordinarily expected during the pretrial period, and defendant was not denied the right to effective assistance of counsel.

III. Admission of MRE 404(b) Evidence

Next, defendant argues that the trial court abused its discretion when it admitted evidence of the 2001 sexual assault under MRE 404(b). We disagree. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Hine*, 467 Mich 242, 250-251; 650 NW2d 659 (2002).

MRE 404(b)(1), which governs the admission of other acts evidence, provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of inclusion. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001). Relevant other acts evidence does not violate MRE 404(b) unless offered only to show the criminal propensity of an individual and to establish that he acted in conformity therewith. *People v Katt*, 248 Mich App 282, 304-305; 639 NW2d 815 (2001), *aff'd* 468 Mich 272 (2003).

² During the MRE 404(b) motion hearings, defense counsel presented defendant's alternate theory of the case. Defendant claimed that he and the victim's mother had an ongoing sexual relationship, and that the victim's mother had planted his semen (taken from a used condom) on the victim in order to frame defendant for sexual assault. Defendant claimed that his sexual encounter with the 17-year-old had been consensual. Insufficient evidence was presented at trial to support this theory of the case. The victim, her mother, and the 17-year-old each denied knowing defendant or having a relationship or consensual interaction with him.

Our Supreme Court developed a four-part test to determine if other acts evidence is admissible pursuant to MRE 404(b):

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a “determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.” Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994) (internal citation omitted).]

Evidence offered to prove identity must meet an additional test. This Court has affirmed that the test articulated by our Supreme Court in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), “‘remains valid’ when the proponent of the other acts evidence uses it ‘to show identification through modus operandi.’” *People v Smith*, 243 Mich App 657, 671; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 931 (2001), quoting *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). Under the *Golochowicz* test, four circumstances must be present in order to offer evidence to prove identity:

(1) [T]here must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant’s identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act or opportunity, preparation and knowledge; (3) one or more of these factors must be material to the determination of the defendant’s guilt of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice. [*Golochowicz, supra* at 309.]

The trial court correctly determined that the evidence that defendant sexually assaulted the 17-year-old in 2001 satisfied both the *VanderVliet* and *Golochowicz* tests. Because DNA evidence linked defendant to both incidents, the evidence that defendant committed the 2001 sexual assault was relevant to show that defendant also sexually assaulted the victim in the instant case, that he entered her home with the intent to commit a sexual assault, and that his DNA was found on her because he sexually assaulted her, rather than for some other reason. In essence, the evidence was material to the determination of defendant’s guilt to rebut the anticipated defense theory that the victim’s mother planted the physical evidence on the victim. With regard to the first *Golochowicz* factor, the DNA evidence linking defendant to the 2001 sexual assault constitutes substantial evidence that defendant actually committed that prior bad act. See *Smith, supra* at 672 (finding a “distinct possibility” that substantial evidence that the defendant committed the other bad act existed where the victim in the prior case was able to describe the perpetrator to police, the description matched the defendant, and the victim immediately identified the defendant as her attacker when she saw his photograph in the

newspaper). The unusual nature of both attacks, in which the perpetrator would enter a house late at night and rape a teenage girl asleep in her bed, tend to prove that defendant committed both acts and to disavow the proposed defense theory that defendant was framed.

In addition, the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed its prejudicial effect. Although the evidence was prejudicial to defendant, it was also highly probative. “Whether other-acts evidence is more prejudicial than probative is best left to the contemporaneous assessment of the trial court.” *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). The probative value of this evidence is not substantially outweighed by the danger of unfair prejudice.

Finally, the jury was properly instructed to only consider the testimony of the woman who was sexually assaulted in 2001 to show that the person who committed that offense also sexually assaulted the victim. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, we assume that the jurors only considered this evidence for a proper purpose.

IV. Denial of Defendant’s Request for Self-Representation

Finally, defendant argues that the trial court improperly denied defendant’s request to represent himself, violating defendant’s state and federal constitutional right of self-representation. We disagree. “Although we review for clear error the trial court’s factual findings regarding a defendant’s knowing and intelligent waiver of [Sixth Amendment rights], . . . the meaning of ‘knowing and intelligent’ is a question of law. We review questions of law de novo.” *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004), citing *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). An erroneous denial of the right to self-representation is a structural error requiring reversal of defendant’s conviction. *United States v Gonzalez-Lopez*, ___ US ___, 126 S Ct 2557, 2564; 165 L Ed 2d 409, 419 (2006).

A criminal defendant’s right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by both the Michigan Constitution, Const 1963, art 1, § 13, and by statute, MCL 763.1. Because the right to self-representation is not absolute, several requirements must be met before a defendant may represent himself. *People v Russell*, 471 Mich 182, 190-191; 684 NW2d 745 (2004). First, a defendant’s request to represent himself must be unequivocal. *Williams*, *supra* at 642. Second, “the trial court must be satisfied that the waiver [of the right to counsel] is knowingly, intelligently, and voluntarily made.” *Id.* “Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business.” *Id.* Finally, the trial court must comply with the requirements of MCR 6.005 by advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risks of self-representation, and by offering the defendant the opportunity to consult with a lawyer. MCR 6.005(D); *Russell*, *supra* at 190-191.

In order to determine whether a defendant has knowingly, intelligently, and voluntarily asserted his right to waive assistance of counsel, the trial court may consider defendant’s competence. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994), quoting *People v Anderson*, 398 Mich 361, 368; 247 NW2d 857 (1976). “But his competence does not refer to

legal skills, “[f]or his technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of the right to defend himself.” *Dennany, supra* at 432, quoting *Anderson, supra* at 368, quoting *Faretta v California*, 422 US 806, 835; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

The trial court appears to have considered defendant’s “technical legal knowledge” when denying his request to represent himself at trial, although it should not have considered this in determining whether defendant knowingly and intelligently asserted his right to self-representation. However, because the trial court based its assessment on defendant’s “questions and comments,” it appears that the court also weighed defendant’s general competence and concluded that defendant did not intelligently assert his right to self-representation. The trial court’s conclusion was not clearly erroneous because defendant’s statements suggest that he was confused about basic issues involved in the case. For example, defendant seemed confused about the relationship between the victim’s consent and DNA evidence. After defendant told the court that his attorney had not made a motion “for an Evidentiary Hearing on the DNA evidence,” the trial court asked what the purpose of such a motion would be given the defense theory that the victim’s mother planted defendant’s DNA on the victim. Defendant responded,

Well, I said from the beginning there was consent and can’t be any DNA from me, and they keep saying it is, and it was. So, I’m saying that’s the only way it could have got there if it was there. I’m not saying it was. I’m saying if it was though, that’s the only way it could have got there. That’s what I’m saying.

In light of defendant’s failure to competently articulate his reasons for wanting to represent himself and his confusion regarding the purpose and effect of the DNA evidence, it was not clear error for the trial court to find that defendant had not knowingly and intelligently asserted his right to self-representation.

Further, defendant only requested to represent himself after trial had begun. Although the fact that trial has already begun does not preclude a defendant from asserting his right to self-representation, “the potential for delay and inconvenience to the court may be greater if the request [for self-representation] is made during trial.” *Anderson, supra* at 368. It was not improper for the trial court to consider whether a change in representation during the trial would cause delay or inconvenience and to conclude that defendant’s self-representation would be disruptive, inconvenient, and burdensome for the court.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens